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No. 85-901

In the Supreme Court of the United States

October Term, 1985

DWIGHT SHEFFER, LARRY KREBBS, and MICHAEL KREBBS, as Members of the Board of Trustees of Canton Township, Stark County, Ohio,
Petitioners,

vs.

RICHARD MALLONN, Auditor, City of Canton, Ohio and JAMES BOWE, Agent for Annexation Petitioners,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the United States Supreme Court re-examine its clear and unequivocal holding in *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), that the Fifth and Fourteenth Amendments of the Federal Constitution do not apply to state annexation statutes when this decision was reviewed and reaffirmed in the 1978 decision *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978)?

2. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* does a hearing which puts no limitation on the length of direct testimony, rebuttal testimony, summation and commenting on the evidence, and which allows Petitioners to be represented by counsel, afford Petitioners adequate due process protection?

3. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* should Petitioners be barred from raising constitutional questions before the United States Supreme Court where such issues were not raised in the appeal before the state court?

4. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* is the denial of cross-examination and subpoenas harmless error where the state law standard for granting an annexation is clearly met?

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No. 85-901

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October Term, 1985

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RICHARD MALLONN, Auditor, City of Canton, Ohio and JAMES BOWE, Agent for Annexation Petitioners,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

COUNTERSTATEMENT OF THE CASE

Petitioners seek this Writ of Certiorari from the decisions of all levels of courts of the State of Ohio and the Board of County Commissioners of Stark County, Ohio, which granted the request of all landowners in the territory to be annexed.

In June of 1983, a petition for annexation to the City of Canton was filed with the Board of County Commissioners seeking the annexation of 163.21 acres of land in Canton Township. The petition was unanimously signed by all landowners in the territory.

The land is 163.21 acres of industrial land which the landowners want to develop, but development is prevented due to the limitation of the Township to provide the necessary services. The land is held by six (6) different entities, all of which signed the annexation petition and continue to support annexation.

A public hearing was held by the Board of Stark County Commissioners on the petition for annexation on August 24, 1983. The hearing was extensive, and every individual wishing to be heard was permitted to speak. The annexation petition was approved by a resolution of the Board of Stark County Commissioners on November 22, 1983, as being in the best interest of the territory to be annexed and filed with the City of Canton on November 29, 1983. On January 27, 1984, the Appellant filed a complaint for an injunction seeking to block the annexation that had been unanimously requested by the landowners and approved by the Commissioners.

Petitioners correctly note that the Trial Court and the Fifth Ohio Appellate District concluded that the annexation was proper and the Ohio Supreme Court refused to hear the appeal on July 31, 1985.

Petitioners incorrectly state that the Fifth Ohio Appellate District rejected the federally grounded constitutional challenges made in the Trial Court. As specifically noted in their opinion, only two errors were assigned on appeal. Those errors centered around whether legal rights or interests were impaired (taxes, maintenance of roads, and similar issues) and whether the resolution passed by the Board of County Commissioners met the statutory requirements. Those were the only issues up on review. The Court did attach the Findings of Fact and Conclusions of Law of the Trial Court, but those issues were not

raised or argued on appeal, nor were they discussed in the decision of the Appellate Court. (See Opinion of the Court of Appeals for Stark County, Ohio, Petitioners' Appendix A4.)

Thus, Petitioners, as the Board of Trustees of Canton Township, seek to deny an annexation requested by all landowners in the area to be annexed and that has been ruled to be in the best interest of the territory to be annexed by the Board of Stark County Commissioners and all three (3) levels of courts of the State of Ohio.

SUMMARY OF ARGUMENT

Petitioners' attempt to characterize the well-settled law on point as ripe for review is totally unfounded. Not only does the *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), decision unequivocally state that no provision of the Federal Constitution applies to state annexation matters, the validity of this decision has been maintained by strict adherence in the lower federal courts. Even more importantly, this Court recently confirmed the "constitutional significance" of *Hunter*. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). Consequently, Petitioners' reliance on the due process and equal protection clauses of the Federal Constitution is misplaced.

Even if Petitioners' constitutional argument had any merit, the Supreme Court has no jurisdiction in this case because the federal constitutional question was not raised at every level of review in the courts below. In particular, the Court of Appeals of Ohio was not afforded the opportunity to review and decide the constitutional issues now placed before the Supreme Court because Petitioners did not raise these issues in the appeal.

Even if the jurisdictional obstacle is somehow overcome, the procedural process afforded Petitioners in this instance comports with the due process requirements of the Federal Constitution. The procedural protections in the hearing afforded Petitioners were more than adequate to protect any property interests that they might have had in the state annexation case.

Even if there is a constitutional right implicated, denial of cross-examination and subpoenas is harmless error. Ohio law requires that the wishes of the property owners be granted in an annexation case. In this case, the property owners unanimously desire annexation.

REASONS FOR DENYING THE WRIT

I. THE UNITED STATES SUPREME COURT HAS NO REASON TO RE-EXAMINE HUNTER v. CITY OF PITTSBURGH, 207 U.S. 161 (1907), SINCE THIS COURT REVIEWED AND REAFFIRMED THAT DECISION IN THE RECENT CASE OF HOLT CIVIC CLUB v. CITY OF TUSCALOOSA, 439 U.S. 60 (1978).

The holding in *Hunter* that no provisions of the Federal Constitution apply to state annexation issues is in line with mainstream constitutional analysis. Petitioners' claim that the Fifth and Fourteenth Amendments of the United States Constitution apply to state annexation matters has been rejected by numerous lower federal courts in the 70 years since the *Hunter* decision. In fact, this Court recently rejected such a claim. *See Holt Civic Center v. City of Tuscaloosa*, 439 U.S. 60 (1978).

The Court in *Hunter* ruled that the due process and equal protection clauses of the Fourteenth Amendment do not apply to state annexation cases. This Court explained that annexation matters fall entirely within the discretion and standards of the state constitution. The state has the sole control of its political subdivisions and may create, modify, or destroy them as its own state constitution permits. Moreover, Petitioners' argument that the due process clause works to protect and preserve the tax base of the Township, is totally without merit. The Court in *Hunter* specifically ruled that nothing in the Federal Constitution protects property owners from the injurious consequences of annexation, including the burden of increased taxation:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies,

> expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do so as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

Petitioners cannot even point to conflict within the lower federal courts concerning the application of *Hunter*. On the contrary, the carefully reasoned rationale of *Hunter* has consistently been applied by all the lower federal courts, including a case upholding the constitutionality of the Ohio Statute. *See, e.g., Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984) ("No federal constitutional principle may be invoked to invalidate Ohio Revised Code Section 709.033 on equal protection or due process grounds in the face of the strong affirmation of state power over its subdivision of government as set forth in *Hunter* and *Holt* . . ." *Id.* at 290); *Township of Jefferson v. City of*

West Carrollton, 517 F. Supp. 417 (S.D. Ohio 1981), *aff'd,* 718 F.2d 1099 (6th Cir. 1983) (the *Hunter* case ". . . reflects a viable principle of law that annexation matters fall entirely within the discretion and standards of the state constitution. . ." *Id.* at 419); *Detroit Edison Company v. East China Township School District No. 3,* 378 F.2d 225 (6th Cir. 1967), *cert. denied,* 389 U.S. 932 (annexation procedure is a legislative matter and not justiciable under the due process or equal protection clauses of the Fourteenth Amendment, Federal Constitution); *Hammonds v. City of Corpus Christi,* 343 F.2d 161 (5th Cir.), *cert. denied,* 382 U.S. 837 (1965); *International Harvester Co. v. Kansas City,* 308 F.2d 35 (10th Cir. 1962), *cert. denied,* 371 U.S. 948 (1963); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321 (6th Cir.), *cert. denied,* 389 U.S. 975 (1965).

Of primary importance, however, is the fact this Court recently confirmed the constitutional validity of *Hunter.* In *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), the Court reviewed its earlier recognition that political subdivisions are created by the state as convenient agencies for exercising such other governmental powers of the state as may be entrusted to them. The Court concluded, ". . . we think that the case [*Hunter*] continues to have substantial constitutional significance in emphasing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Id.,* at 71 (Footnote omitted).

In unequivocal language, the Court, in 1978, endorsed the constitutional validity of *Hunter.*[1] Only Petitioners'

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1. The two narrow exceptions to *Hunter* are not appicable on our facts. *Hunter* has been modified to avoid deliberate ma-

(Continued on following page)

complete disregard of the *Holt* decision allows Petitioners to make the argument that *Hunter* should be reversed by the Supreme Court at this time.

II. ASSUMING ARGUENDO THAT THE COURT SHOULD RADICALLY MODIFY OR OVERRULE HUNTER AND HOLT, THE HEARING, WHICH PUT NO LIMITATION ON THE LENGTH OF DIRECT TESTIMONY, REBUTTAL TESTIMONY, SUMMATION AND COMMENTING ON THE EVIDENCE, AND WHICH ALLOWED PETITIONERS TO BE REPRESENTED BY COUNSEL, AFFORDED PETITIONERS DUE PROCESS OF LAW.

The procedural protections afforded Petitioners in the case at hand went beyond the requirements of due process. Ohio law secured to Petitioners the right to a public hearing. O.R.C. §§709.031 and 709.032. It gave the Petitioners the right to representation by counsel at the hearing. O.R.C. §709.07. Moreover, the due process afforded to Petitioners encompassed the right to unlimited direct testimony. It encompassed the right to unlimited rebuttal testimony. It encompassed the right to unlimited summation and commenting on the evidence. These procedural safeguards were more than necessary to protect

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Footnote continued—

nipulation of municipal boundaries for purposes of race discrimination in voting. *See Gomillion v. Lightfoot,* 364 U.S. 339 (1960). Petitioners attempt to characterize the case at hand as analogous to *Gomillion* cannot withstand analysis.

Also, two Supreme Court cases have held that where the state agreed to have important municipal decisions made by votes, the equal protection clause must be applied to all within the jurisdiction whose rights are affected. *Kramer v. Union School District,* 395 U.S. 621 (1969); *Cipriano v. City of Houma,* 395 U.S. 701 (1969).

any property interests that Petitioners may have had in the state annexation procedure.

As the Court in *Cleveland Board of Education v. Loudermill,* 84 L. Ed. 2d 494 (1985) noted, once it is determined that the due process clause applies, the question remains what process is due. *See also, Morrissey v. Brewer,* 408 U.S. 471 (1971). The interpretation and application of the due process clause are practical matters and "[t]he very nature of due process negates any concept of inflexible procedures universally applied to every imaginable situation." *Goss v. Lopez,* 419 U.S. 565, 578 (1975); *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961).

Consequently, Petitioners' assertion that if one is accorded due process rights he automatically is given the right to subpoena witnesses and cross-examine witnesses, simply cannot withstand constitutional analysis. Certainly, the right of confrontation and cross-examination are necessary in some situations. *See, Goldberg v. Kelly,* 379 U.S. 254 (1970). However, the Court in *Goss v. Lopez,* 419 U.S. 565, 578 (1975), recognized that due process requires that at a minimum, deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case.*

The type of notice and the nature of the hearing depend on the accommodation of the competing interests involved. *Goss v. Lopez,* 419 U.S. 565 (1975); *Matthews v. Eldridge,* 424 U.S. 319 (1976). In *Goss,* for example, the Court ruled that due process in connection with a school suspension of ten days or less requires at least rudimentary procedures. Such rudimentary procedures demand only notice and an informed hearing allowing the student to give his side of the story. In *Parham v.*

J.R., 442 U.S. 584 (1979), this Court ruled that due process does not require a formal hearing in determining whether a child may be involuntarily committed to a mental institution.

From these few examples, it is obvious that the nature of due process negates any concept of inflexible procedures universally applied to every situation. *See, generally, Cleveland Board of Education v. Loudermill,* 84 L. Ed. 2d 494 (1985). In the case at hand, the Petitioners were given sufficient procedural protections. The process afforded them complied with the due process necessary in a state annexation case. Additional rights would not have decreased the risk of error in such proceeding. Consequently, the state procedure afforded Petitioners a fair hearing.

III. THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO CONSIDER CONSTITUTIONAL QUESTIONS THAT WERE NOT RAISED BY PETITIONERS IN THE STATE COURTS.

The Court of Appeals for Stark County, Ohio, noted that only two (2) errors were assigned on appeal to that Court. As that Court stated:

> "Bench trial was held in the Court of Common Pleas of Stark County, following which the court issued separate findings of fact and conclusions of law and dismissed the complaint for injunction. The trustees' appeal, assigning two (2) errors:
>
> I. THE TRIAL COURT ERRORED (SIC) IN FINDING THAT APPELLANTS FAILED TO PROVE THAT ITS LEGAL RIGHTS OR INTERESTS WERE IMPAIRED BY THE ANNEXATION.

II. THE TRIAL COURT ERRORED (SIC) IN FINDING THAT THE RESOLUTION PASSED BY THE STARK COUNTY BOARD OF COMMISSIONERS MET ALL THE REQUIREMENTS OF O.R.C. 709.033." (See Opinion of the Court of Appeals for Stark County, Ohio, at Petitioners' Appendix A5.)

Thus, it is clear that the only issues raised on appeal were whether Petitioners proved that their legal rights were impaired (Issues centering around taxes, road improvements, and the like.) and whether the resolution met the statutory prerequisites. No constitutional issues were raised by Petitioners in their appeal in the Ohio Court of Appeals. Thus, this Court may not consider these constitutional issues on appeal. As this Court has noted, it will not consider questions that were not argued throughout the state courts. "The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so." *Adler v. Board of Education,* 342 U.S. 485, 496 (1952). This Court has held that the constitutional issue must have been drawn to the attention of the state court and considered by it. *Capital City Dairy Co. v. Ohio,* 183 U.S. 238 (1902).

It is clear that in this case the constitutional questions were not considered. As noted in the text of the Court of Appeals opinion cited above, the constitutional issues were not raised, and a thorough review of that decision reveals that the constitutional issues were not considered by the Court of Appeals. The constitutional questions must actually be considered as noted in the *Capital City* case cited above. In this case, the Court of Appeals merely incorporated the Separate Findings of Fact and Conclusions of Law of the Trial Court and did not actually consider each

one of those elements as the Petitioners did not raise the constitutional questions in the Court of Appeals.

Even the case cited by Petitioners in support of jurisdiction supports the position that there is no jurisdiction in this case. *Charleston Federal Savings & Loan Association v. Alderson,* 324 U.S. 182 (1944), continues on to say that there must "be an explicit and timely insistence in state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties, or laws." *Id.*, at page 185.

It is clear that these constitutional issues were not raised in the court of appeals in Ohio. The Ohio courts were not presented with the opportunity to review this constitutional question; thus, the United States Supreme Court may not consider the issue as it is without jurisdiction to do so.

IV. ASSUMING ARGUENDO THAT THERE IS A CONSTITUTIONAL RIGHT TO SUBPOENA AND CROSS-EXAMINE WITNESSES IN AN ANNEXATION HEARING, DENIAL OF THAT RIGHT IS HARMLESS ERROR WHERE ALL RELEVANT EVIDENCE REQUIRES THAT THE ANNEXATION BE GRANTED.

Even in cases in which there is a constitutional violation, such constitutional violation is not fatal where it is harmless error. This is true even in the criminal procedure context, which is certainly more protective of rights than matters deailng with annexation of territories to municipalities. If we are to draw an analogy between the right of cross-examination and subpoenas in this case to a criminal right, it would be to the right of confrontation, that is, the right to cross-examine the witnesses against you.

Even in the criminal context with its higher standard, there may be harmless error in the denial of the right of confrontation. Of course, such a standard is not applied in annexation matters, but even if it was, there was only harmless error in this case.

The denial of the right of confrontation is harmless error if it is clear beyond a reasonable doubt that the conviction would have been sustained even in the absence of the error that was committed. *Harrington v. California*, 395 U.S. 250 (1969).

Applying this much higher standard from the criminal context to the instant case, it is clear that even if there were some right to cross-examination and subpoenaing of witnesses in an annexation hearing, that it was harmless error in this case. That is because Ohio law requires granting of an annexation where the landowners desire an annexation, even if the annexation will be solely to their benefit and to the detriment of surrounding territory. *Lariccia v. Board of Commissioners*, 38 Ohio St.2d 99 (1974); *In re: Kucharski*, 56 Ohio App.2d 121 (Montgomery 1977); *In re: Char*, 59 Ohio App.2d 146 (Montgomery 1978).

In this case, the landowners unanimously request annexation; and under the Ohio standard, the annexation would have been granted regardless of what witnesses would have been subpoenaed, what questions would have been asked, and what the answers would have been. Where the landowners desire annexation, even if it is solely for their commercial benefit and will be to the detriment of the surrounding territory, the annexation must be granted. This is the law of the State of Ohio and, thus, the annexation would have been granted; and it was clearly harmless error, if error at all, to deny subpoenas and the right of cross-examination.

CONCLUSION

State annexation matters present no issue of constitutional dimension under the due process and equal protection clauses of the United States Constitution. Moreover, even if the Federal Constitution was somehow implicated in the case at hand, Petitioners were afforded procedural safeguards sufficient to protect any property interests that they might have had in the state annexation case. This Court does not have jurisdiction of the matter because the constitutional question was not raised in the state courts. Further, even if it is assumed that there was a constitutional error, it is harmless error as the annexation would have been granted because all property owners desired annexation. For these reasons, Petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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